90-10

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

NO.

SAMUEL S. GRANITO,

PETITIONER

V.

UNITED STATES,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CHARLES W. RANKIN, ESQUIRE
COUNSEL OF RECORD
JAMES L. SULTAN
RANKIN & SULTAN
ONE COMMERCIAL WHARF NORTH
SECOND FLOOR
BOSTON, MASSACHUSETTS 02110
(617) 720-0011

QUESTIONS PRESENTED

I. Whether the petitioner's RICO convictions must be reversed when one of the three predicate acts charged against him was supported by insufficient evidence, and the jury's general RICO verdict makes it impossible to determine whether the jury relied upon the insufficient predicate act in finding that the government had proven the "pattern of racketeering activity" element of RICO.

II. Whether the "pattern of racketeering activity" element of RICO is unconstitutionally vague as applied to the conduct of the petitioner, when the predicate acts alleged in the indictment were not related to each other, but only related to the alleged enterprise.

PARTIES TO THE PROCEEDINGS

In addition to the named parties, Gennaro J. Angiulo, Donato F. Angiulo, Francesco J. Angiulo, and Michele A. Angiulo were also appellants in the United States Court of Appeals for the First Circuit.

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Samuel S. Granito hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this criminal case.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., 1a-109a) is reported at 897 F.2d 1169 (1st Cir. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 5, 1990. The petitioner filed a timely Petition for Rehearing on March 15, 1990. The Petition for Rehearing was denied by the court on March 26, 1990. 113a. The jurisdiction of this Court is invoked under 28 U.S.C. §

1254(1) (West Supp. 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

Title 18 U.S.C. § 1961(5) (West 1984) provides:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . .

* * * * *

Title 18 U.S.C. § 1962(c) and § 1962(d)(West 1984 & Supp. 1990) provide:

> (c) It shall be unlawful for any

person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

* * * * *

Massachusetts General Laws Annotated Chapter 274, § 2 (West 1990) provides:

Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon.

* * * * *

Massachusetts General Laws Annotated Chapter 265, § 1 (West 1990) provides:

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be murder in the first degree is murder in the second degree. . . . The degree of murder shall be found by

the jury.

STATEMENT OF THE CASE

On September 19, 1983, a grand jury sitting in the District of Massachusetts returned a lengthy, 20-count indictment against seven defendants, including the petitioner Samuel S. Granito. Granito was named in three counts of the indictment, charging him with conspiring to violate the RICO statute (Count 1); a substantive violation of the RICO statute (Count 2); and conducting an illegal gambling business prohibited by state law in violation of 18 U.S.C. § 1955 (West 1984)(Count 4). A total of three predicate acts were charged against Granito in the RICO counts. Two paragraphs (a-8 and a-9) accused him, respectively, of conspiring to murder Angelo Patrizzi and with being an accessory before the fact to the murder of Patrizzi by Frederick Simone and others. The substantive gambling offense charged against Granito was also enumerated as a RICO predicate act (b-2). The indictment alleged that Granito and the other defendants were members of the Patriarca family of La Cosa Nostra.

Prior to trial, the petitioner Granito moved to dismiss the RICO counts because the pattern of racketeering activity element of the statute was unconstitutionally vague, as applied to his conduct. The trial court denied the motion to dismiss. 110a-111a.

Trial commenced on July 10, 1985. A substantial portion of the government's evidence consisted of tape-recorded fruits of electronic surveillance. All of the tapes proffered by the government were introduced into evidence and played to the jury, accompanied by government-

created transcripts which purported to identify the individual speakers as well as their putative words. During the entire four-month period of electronic surveillance, petitioner Granito was allegedly overheard on only two occasions.

The government's theory respecting the murder of Angelo Patrizzi, as presented at trial, was initially set forth in its opening statement. Tr. 1-71-78. According to the prosecution, Samuel Granito and Frederick Simone met with Gennaro Angiulo at 98 Prince Street in Boston on March 11, 1981 and discussed their prior, unsuccessful attempts to kill Patrizzi. Tr. 1-72-74.[1/] According to the government, Gennaro Angiulo and Ilario Zannino subsequently assumed responsibility for murdering Patrizzi.[2/] Without specifically identifying the alleged killer, the government asserted in its opening that "Angelo Patrizzi was ... clipped or murdered at the direction of Gennaro Angiulo and Ilario Zannino." Tr. 1-78.

The government introduced four tape recordings concerning the murder of Angelo Patrizzi. The first tape (#309) allegedly contained a conversation intercepted at 98 Prince Street on March 11, 1981 at 7:55 p.m. Tr. 4-66. According to the government, Gennaro Angiulo, Samuel Granito, and Frederick Simone were participants in that

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1/ Simone was identified as an unindicted co-conspirator. Gennaro Angiulo was a co-defendant.

2/ Ilario Zannino was initially a co-defendant. The case against him was severed early in the trial due to Zannino's ill health.

conversation. Viewed in the light most favorable to the government, the conversation contains a description by Granito and Simone of several unsuccessful attempts to murder Patrizzi. All they have managed to achieve is a phone number in South Boston which may provide a means of learning Patrizzi's whereabouts. At the conclusion of the conversation, Gennaro Angiulo asks Granito or Simone to give him that telephone number. Granito says that he is leaving town to "take a rest." Tape #309 was the sole recording concerning Angelo Patrizzi introduced by the government at trial on which Granito allegedly appeared.

The second relevant tape (#322) was allegedly recorded at 98 Prince Street on March 12, 1981 at 5:35 p.m. Tr. 41-100. The government claims that Gennaro Angiulo, Ilario Zannino, and an unknown male were present during that conversation. Examined in the light most favorable to the government's theory, this conversation reflects a determination by Gennaro Angiulo that he and Zannino will now assume the direct responsibility for the murder of Angelo Patrizzi. Angiulo describes his conversation with Granito and Simone the previous evening. According to the government's transcript, Angiulo and Zannino discuss several possible scenarios for murdering Patrizzi. None of these plans involves Granito, who is referred to in the following terms:

> Sammy says ... "why you know I ... old guy." "Sammy, ... forget about it. We don't want to know about old guys. We want to find out about new guys."

Gov. Trans. (#322), p. 1. Moreover, none of the potential scenarios discussed during this conversation suggests that Frederick Simone would play any part in the murder of Angelo Patrizzi.

The third tape introduced by the government regarding Angelo Patrizzi was allegedly recorded at 98 Prince Street on March 12, 1981 at 6:23 p.m. (#323). The government alleges that Gennaro Angiulo and Ilario Zannino participated in this brief conversation regarding "the number." Viewing this evidence in the light most favorable to the government's theory, it constituted a follow-up to the earlier conversation respecting a phone number in South Boston which might provide insight into the location of Angelo Patrizzi. The conversation is devoid of any reference to Granito, Simone, or any other specific person.

The final tape introduced by the government about Angelo Patrizzi (#11-M(ix)) was allegedly recorded at 51 North Margin Street in Boston on April 3, 1981 at 3:53 a.m. According to the government, Ilario Zannino, John Cincotti, and Ralph Lamattina participated in the relevant portion of the conversation.[3/] Taken in the light most favorable to the government, the conversation includes Zannino's recounting of what he has been told about Patrizzi's murder. The government's transcript of the conversation attributes the following excerpt to Zannino:

3/ Cincotti and Lamattina were named as unindicted co-conspirators.

> Nine of them. Nine of them. They lugged him from the fuckin' Topcoat. Nine fuckin' guys.
>
> * * *
>
> But that's alright. They did, John. He went in for a topcoat. And nine of them did it. Sonny did. Sonny Boy. You know all the fuckin' camurist (troublemakers). And he's in his trunk.

Gov. Trans., p. 2.

The government presented evidence that the body of Angelo Patrizzi was found in the trunk of a stolen automobile in Lynn, Massachusetts on June 11, 1981.[4/] Tr. 39-20. Dr. George Katsas, the medical examiner who conducted an autopsy of the body, testified that the cause of death was strangulation. Dr. Katsas was unable to specify the time of death, but stated that Patrizzi had been dead "at least a couple of weeks" when his body was discovered. Tr. 40-62-63. Roland Walton, an automobile dealer, testified that he discovered the vehicle in which Patrizzi's body was found missing from his lot in June 1981. He stated that he would likely have known on May 15, 1981 that the vehicle was missing if it had been taken before that date. Tr. 40-113.

The government presented evidence that Angelo Patrizzi had resided at the Brooke House, a halfway house in Boston, from January 26, 1981 until he escaped on

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[4/] The parties stipulated that the body found was, in fact, Angelo Patrizzi. Tr. 42-147.

March 3, 1981. Tr. 41-34. Patrizzi was employed by Surf Auto Body in Revere during that period. Tr. 41-16. Jean Lampron testified that Patrizzi stayed with her family in South Boston on a frequent basis in February and March 1981. She last saw him on or about March 15, 1981. Tr. 41-67. Martin Coleman, a Boston police officer, testified that he conducted physical surveillance of Surf Auto Body during 1981. He observed Samuel Granito and Frederick Simone there on a frequent basis during the winter, spring and summer of 1981. Tr. 42-67, 42-70. There was no testimony that either Granito or Simone met with Angelo Patrizzi at Surf Auto Body while Patrizzi was employed.

Coleman testified that no one was present at Surf Auto Body during a period lasting approximately ten days in mid-March 1981. Tr. 42-62-63. He also stated that Granito went on a trip to Europe during April 1981. Tr. 42-137. It was the government's theory that Granito planned to go to Florida shortly after meeting with Gennaro Angiulo on March 11, 1981. Tr. 122-96. No testimony was offered specifically placing Granito or Frederick Simone in Massachusetts anytime between March 11, 1981 and the discovery of Angelo Patrizzi's body three months later.

There was no other probative evidence about how the murder of Angelo Patrizzi was carried out or the identity of the person or persons responsible for his death. The FBI case agent, Edward Quinn, testified that "I am not sure that that murder has been solved." Tr. 97-109. Indeed, the only evidence arguably shedding any light upon what actually happened to Patrizzi was Tape-record-

ing 11-M(ix), described above. None of the alleged participants in that conversation, Zannino, Cincotti, or Lamattina, was a defendant or witness at the trial of this case.

In its closing argument, the government made no specific contention as to who actually killed Angelo Patrizzi. *See* Tr. 123-29-43, 126.

With respect to the gambling count against Granito, the government relied upon one tape-recording and the testimony interpreting that conversation by the government's gambling expert, FBI Special Agent Arthur Eberhart. Eberhart testified that most of a tape-recorded conversation on the evening of March 11, 1981 between Gennaro Angiulo and Samuel Granito consisted of a report by Angiulo to Granito about the activities of an unindicted individual, Nicolo Giso. Tr. 83-78. Eberhart admitted that most of the statements on that tape attributed to Granito related to past gambling activities, rather than to an ongoing poker game at North Margin Street. Tr. 83-73. Nevertheless, Eberhart stated his opinion that Granito asked Gennaro Angiulo for his portion of the proceeds from the North Margin Street game during the course of the tape-recorded conversation. Tr. 85-19-20. Based upon that conversation, Eberhart testified that, in his opinion, Granito was a "partner" in the poker game. Tr. 83-55.

Over petitioner's objection, the government presented the testimony of its putative organized crime expert, FBI Special Agent James Nelson, regarding the structure of the alleged enterprise and the roles played by

particular defendants. Nelson testified that on the basis of his experience and knowledge and his analysis of the tape recordings, it was his opinion that Samuel Granito was *"capo regime* in the Boston family of LCN." Tr. 33-60.

While the government presented substantial evidence at trial respecting the existence of a criminal organization, there was no evidence demonstrating any cognizable relationship between the murder of Angelo Patrizzi and the operation of the North Margin Street poker game, the substantive predicate acts charged against Granito. There was no suggestion that Patrizzi had been murdered as a result of anything relating to the poker game, or that the operation of the poker game was enhanced or affected in any fashion by Patrizzi's murder. In effect, the government asked the jury to find beyond a reasonable doubt that these alleged acts were part of a "pattern" based simply on the contention that they were both carried out under aegis of the overall criminal enterprise described in the indictment.

Before the district court charged the jury, an extended charge conference with counsel was held. Counsel for Granito argued that Predicate Act a-9 (accessory to the murder of Angelo Patrizzi) should be stricken on grounds of insufficient evidence. Tr. 127-3. The trial court refused to strike Predicate Act a-9.

In instructing the jury about the charges against Granito relating to the murder of Angelo Patrizzi, the trial court read both predicate acts (a-8 and a-9) aloud. Tr. 127-122. After defining the offense of murder under Massachusetts law, Tr. 127-123-125, the trial court turned

to the two specific offenses alleged -- conspiracy to murder and accessory before the fact of murder. Instructing the jury on Predicate Act a-9, charging accessory before the fact, the trial court read the relevant Massachusetts statute, Mass. Gen. Laws ch. 274, § 2. Tr. 127-125-126. The instruction then continued as follows:

> To find either of the defendants [Gennaro Angiulo or Samuel Granito] guilty of this offense beyond a reasonable doubt you must find first that Frederick Simone committed or was otherwise a principal in the commission of the murder of Angelo Patrizzi. You must then find that the defendant under your consideration counseled, hired, or otherwise procured this murder by intentionally assisting Simone in the commission of the crime or significantly participated in its preparation. And you must find that the defendant did this while sharing with Simone the mental state required for that crime, that is malice aforethought.

Tr. 127-126.

In instructing the jury about the RICO counts, the trial court stated that the government had to prove that a particular defendant had participated or agreed to participate in conducting the affairs of an enterprise through a pattern of racketeering activity. "Pattern" was defined as acts which were "... connected to each other by some common scheme, plan, or motive and were of sufficient number such that you find that they constituted a planned ongoing continuing crime, in other words, a pattern as opposed to sporadic, unrelated, isolated criminal epi-

sodes." Tr. 127-108, 118, 117. Granito's counsel objected to this pattern instruction. Tr. 127-136.

Granito requested the trial court to instruct the jury, that "while two [racketeering] acts are necessary [to constitute a 'pattern'], they may not be sufficient." That language was taken directly from this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The trial court refused to deliver the requested instruction, and the defendant objected.

In instructing the jury about the charges against each individual defendant, the trial court delivered the following instruction regarding defendant Granito:

> With respect to the defendant Samuel S. Granito, the Government must prove beyond a reasonable doubt that he engaged in a pattern of racketeering activity consisting both of the following offenses, as alleged in paragraph 6(e) of Counts One and Two of the indictment: (1) conspiring to murder and being accessory before the fact of the murder of Angelo Patrizzi. And (2) conducting an illegal gambling business involving poker games at Boston.

Tr. 127-114. The court further told the jury that they must "... unanimously agree as to which of the two or more acts of racketeering, if any, [a defendant] has committed or aided and abetted in the committing." Tr. 127-115.

At the conclusion of the jury charge, counsel for Granito objected once again to the court's failure to strike the predicate act alleging accessory before the fact to murder. Tr. 127-135. He argued that if the accessory to

murder predicate act was not to be stricken, then at least the verdict form should provide the jury with an opportunity to specify which predicate acts they were finding as to each individual defendant. *Id.* The government opposed such a special verdict form, opting for a general verdict form. Tr. 127-157-158. The district court rejected the proposal by Granito's counsel and employed a general verdict form.

During its deliberations, the jury submitted a question to the court asking whether the accessory to murder and conspiracy to murder predicate acts were separate acts and whether the jury had to find both in order to satisfy the elements of RICO. The court responded that "they are two separate acts" and that either one *or* the other had to be proven beyond a reasonable doubt. Tr. 137-7.

On February 26, 1986, following 136 days of trial and lengthy jury deliberations, the jury returned its verdict. Petitioner Samuel S. Granito was convicted of all three counts charged against him. On April 3, 1986, Granito, who is now 83 years old, was sentenced to twenty years' imprisonment and a $25,000 fine on the substantive RICO count (Count 2); a concurrent sentence of ten years' imprisonment and a $25,000 fine, suspended on the RICO conspiracy count (Count 1); and sentence of five years' imprisonment, suspended, and a $10,000 fine on the gambling count (Count 4), for a total of 20 years' imprisonment and fines totalling $35,000.

On appeal Granito contended that the RICO convictions had to be reversed because insufficient

evidence was presented to prove that Granito was an accessory before the fact to the murder of Angelo Patrizzi. There was no proof that Frederick Simone played any role in Angelo Patrizzi's eventual death. Because the jury returned a general verdict on both of the RICO counts, Granito argued, the RICO convictions must be overturned because it was impossible to know whether the jury relied upon the insufficient accessory charge as one of the predicate acts it found under RICO. 54a-65a.

The court of appeals agreed that the government had proffered insufficient evidence to sustain the accessory to murder charge. 60a-61a. However, it rejected the petitioner's contention that the general RICO verdicts must be set aside. Instead, the court of appeals held that reversal of Granito's RICO conviction was not required because it concluded that if the jury had relied upon the insufficiently-supported accessory to murder charge as a predicate act, then it must "of necessity" have relied upon the sufficiently-supported conspiracy to murder charge as well. 64a-65a.

Granito also argued that the First Circuit should reverse his RICO convictions because the pattern element was unduly vague as applied to his conduct since there was no relationship between the alleged murder of Patrizzi and the conduct of the illegal gambling business. The First Circuit acknowledged that "potential uncertainty exists regarding the precise reach of RICO's 'pattern of racketeering' element." 12a. The court did not dispute Granito's argument that there was no evidence to show that Patrizzi's death was related to the card game or *vice*

versa. The court held that it was sufficient, for constitutional purposes, if the acts were related to the affairs of the enterprise. 14a. The court of appeals also rejected Granito's argument that the lower court erred in failing to give the requested instruction based upon *Sedima*. 89a-91a.

REASONS FOR GRANTING THE PETITION

1. The lower court's decision, permitting general RICO verdicts to stand even though one of the three predicate acts was supported by insufficient evidence, conflicts with this Court's decisions in *Zant v. Stephens*, 462 U.S. 862, 880-84 (1983), *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), and *Yates v. United States*, 354 U.S. 298, 312 (1957). In *Zant*, the Court held that

> [A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. at 881. The justification for such a rule is self-evident. In *Haupt v. United States*, 330 U.S. 631, 641 n.1 (1947), the Court held:

> [W]here several acts are pleaded in a single count and submitted to the jury under instructions which allow a verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any wrongly submitted act was not the one convicted upon. If acts were pleaded in separate counts, or a special verdict were

> required as to each overt act of a single count, the conviction could be sustained on a single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved.

See also Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); *Int. Bro. of B.,I.S.,B.,F. & H. v. Hardeman*, 401 U.S. 233, 252 (1971) (White, conc.) ("It is as much a denial of due process to sustain a conviction merely because a verdict of guilty *might* have been rendered on a valid ground as it is to send an accused to prison following conviction on a charge on which he was never tried.") (emphasis in original).

The courts of appeals have faced two different scenarios in addressing cases where juries returned general RICO verdicts and one or more predicate acts are deemed invalid. First, and easiest, are those cases in which the defendant was only charged with two predicate acts, and one of those is later determined to be legally insufficient to constitute a predicate act. In such cases, reversal is required. *See, e.g., United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) (RICO conspiracy conviction of defendant Tomasulo must be reversed since he was only charged with two predicate acts, one of which was determined by the court of appeals to be legally insufficient).

Second, and more difficult, are the cases in which two or more legally sufficient predicate acts remain after the legally insufficient acts are cast aside. In this situation,

the courts of appeal have long been in conflict. Some circuits have held that the RICO conviction must be reversed because the appellate court cannot be certain that the jury did not rely upon the legally insufficient predicate acts, without engaging in impermissible speculation. *See, e.g., United States v. Walgren*, 885 F.2d 1417, 1424-26 (9th Cir. 1989); *United States v. Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3190 (1989); *United States v. Holzer*, 840 F.2d 1343, 1350-52 (7th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 315 (1988); *United States v. Kragness*, 830 F.2d 842, 861 (8th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 2086 (1989); *United States v. Ruggiero*, 726 F.2d 913, 921-22 (2d Cir. 1984); *United States v. Brown*, 583 F.2d 659, 669-70 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

In *Kragness*, 830 F.2d at 861, the court reversed a defendant's RICO conviction, declaring:

> Although evidence of many other predicate acts was strong, we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed. There is a possibility that his conviction is based on a finding that he committed [legally insufficient] acts 10(a) and 10(b), but no others. As a practical matter, this seems most unlikely, but in a criminal case a conviction may not be upheld on the basis of speculation or inference, however strong, of this kind. It is the jury that must convict, not an appellate court. If the instructions leave open the logical possibility that the verdict is based on a legally insufficient

predicate, the conviction cannot stand.

See also United States v. Lopez, 803 F.2d 969, 975 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) ("A conspiracy conviction must be reversed if the trial court instructs the jury that it need find only one of the multiple objects alleged in order to convict of conspiracy in a case in which the reviewing court holds any one of the supporting counts legally insufficient.")

The Fifth Circuit, in contrast, permits RICO convictions to stand so long as the jury convicted the defendant of at least two valid predicate acts which were also charged as substantive counts in the indictment. *See, e.g., United States v. Peacock*, 654 F.2d 339, 348 (5th Cir. 1981), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. Unit B 1982), *cert. denied*, 464 U.S. 965 (1983).

The courts of appeals in the First, Sixth and Eleventh Circuits have gone even farther to sustain RICO convictions where at least one of the predicate acts has been deemed insufficient. In those circuits, the conviction will be affirmed even if the remaining predicate acts were not charged as substantive counts, if the appellate court, by delving into what it believes the thought processes of the jury to have been, determines that the jury must have found at least two legally sufficient predicate acts. In *United States v. Corona*, 885 F.2d 766 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1838 (1990), for example, the district court dismissed six mail fraud predicate acts because of the Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). The court of appeals reversed one Travel Act predicate act and was left with four legally

sufficient predicate acts out of the eleven charged in the indictment. Only one of the remaining four predicate acts was also charged in a separate count in the indictment. Because the defendant conceded that the "mail fraud charges subsumed the Travel Act charges," a majority of the court of appeals found that the "jury could not reasonably have found that Ray Corona performed the mail fraud but not the Travel Act conduct." 885 F.2d at 774-75. Judge Vance dissented, citing *Ruggiero*, and would have held that a new trial was required on the RICO counts, "since it cannot be determined whether [the jury] based its [general] verdict on at least two valid predicate acts." 885 F.2d at 775. *See also Callanan v. United States*, 881 F.2d 229, 234-35 (6th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1816 (1990).

The conflict on this issue between the Third and Fifth Circuits was noted by Justices White and Brennan in *McCulloch v. United States*, 484 U.S. 947 (1987), dissenting from the denial of certiorari. Since the Court declined to consider the question in *McCulloch*, the courts of appeals have fallen into further conflict, as the instant case demonstrates.

No defendant may be convicted of a crime unless the jury finds that the government has satisfied its burden of proving each and every element of the offense charged beyond a reasonable doubt. *See In Re Winship*, 397 U.S. 358 (1970). A reviewing court must not speculate on the decision-making process of the jury. *See, e.g., Dunn v. United States*, 284 U.S. 390, 394 (1932). A jury may return an inconsistent verdict. *United States v. Capone*, 683 F.2d

582, 590 (1st Cir. 1982). A jury may convict a defendant on some counts, and not others, even though the underlying facts are closely related. *United States v. Elders*, 569 F.2d 1020, 1026 (7th Cir. 1978). Indeed,

> [e]ven where it is apparent that if one is guilty of aiding and abetting, that person of necessity must also have been a conspirator, the cases are clear that the jury may acquit on the conspiracy and convict on aiding and abetting.

United States v. Krogstad, 576 F.2d 22, 29 (3d Cir. 1978).

Taken together, these legal principles stand for a single basic proposition -- the jury is free to deliberate and render its verdict as it sees fit, without regard to what an appellate court might think of its reasoning, its deliberative process, or its decision. In examining a general verdict, there is simply no way for a reviewing court to know what a jury "necessarily must have found" in reaching its conclusion. An attempt to do so requires the reviewing court to put itself in the minds of the jurors and speculate as to how they looked upon the evidence and applied the trial court's instructions. It may well be possible to state with confidence how a rational jury should have proceeded and what a reasonable jury should have thought. Yet, as Justice Jackson observed in a decision which presaged *Winship* by nearly twenty years: "Juries are not bound by what seems inescapable logic to judges." *Morissette v. United States*, 342 U.S. 246, 276 (1951).

Thus, the courts of appeals which have upheld

RICO convictions notwithstanding one or more legally insufficient predicate acts have done so by impermissibly trenching upon the exclusive fact-finding province of the jury. This case provides an appropriate vehicle for this Court to put a halt to that disturbing trend and reinforce the vitality of *Stromberg* and its progeny.[5/]

In upholding Granito's RICO convictions, the First Circuit relied principally upon *United States v. Ochs*, 842 F.2d 515, 520 (1st Cir. 1988). In *Ochs*, the court articulated an exception to the general rule that a general verdict must be set aside if the jury was instructed it could rely on any of several alternative grounds and one of those

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[5/] The analysis adopted by the First, Fifth, Sixth and Eleventh Circuits is also problematic because it reduces the meaning of the term "pattern" to a simple numerical calculation. In those circuits, so long as the appellate court can divine some manner in which the jury probably found two predicate acts to have been proven, the conviction will be upheld. Completely ignored is this Court's struggle, reflected in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 109 S.Ct. 2893 (1989), to give some meaning to the term "pattern." The RICO statute, of course, does not define pattern. It merely states that a pattern requires at least two acts of racketeering activity. In *Sedima* and *Northwestern Bell*, the Court held that to meet the pattern requirement, the government must prove that the predicate acts found by the jury are related in some fashion and demonstrate, or pose the threat of, continuing criminal activity. If a jury is properly instructed, and follows the instructions, then it will have found both relationship and continuity. It is one thing for an appellate court, as the First Circuit did here, to speculate about which predicate acts the jury necessarily found. It is quite another to go a step further and say that the jury must also have found that the necessarily found predicate acts also satisfied the relationship plus continuity requirement.

grounds is deemed insufficient. An exception to that rule, articulated in *Ochs*, is that reversal is not required "where uncertainty as to the ground upon which the jury relied can be eliminated." *Id.* In the instant case, the court held, the jury *necessarily* convicted Granito for conspiracy to murder, rendering his RICO convictions valid.

The court's application of the *Ochs* exception to the case at bar is flawed in two distinct respects. First, as noted above, uncertainty as to the ground upon which the jury relied cannot be eliminated here. There is simply no way of knowing, without delving into the jury's collective mind and imputing an appellate court's sense of logic and reason, which predicate acts the jury actually found. In addition, neither *Ochs* nor its progeny involved a case, like this one, where the jury was required to pass on different separate offenses charged against the defendant. In *Ochs*, there was a single conspiracy count at issue with three different theories of fraud alleged. 842 F.2d at 520. Similarly, in *United States v. Jacobs*, 475 F.2d 270, 281-283 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973), a single conspiracy count was again at issue with two alternative theories of culpability offered by the government. It is one thing to assert, as the court did in *Ochs*, that the jury may not have bought one theory without necessarily buying another. It is quite another thing to say, as the court has here, that the jury may not have found the defendant guilty of one *offense* (accessory to murder) without also finding him guilty of another (conspiracy). The latter trenches upon the fundamental principle of due process which requires the *jury* to find every element of

every offense charged. Such an expansion of the *Ochs* exception is constitutionally impermissible and not supported by legal precedent.

The court of appeals' analysis of the general verdict reflects a determination that the defendant could not have been convicted as an accessory without necessarily being convicted as a conspirator as well. As a matter of law, such a determination flies in the face of state and federal precedent. The Massachusetts Supreme Judicial Court has held: "It was within the province of the jury to acquit one as a conspirator and to convict him as an accessory before the fact. The offenses were not the same, and the verdicts were not inconsistent." *Massachusetts v. Bloomberg*, 302 Mass. 349, 356, 19 N.E.2d 62 (1939). Federal courts have reached the same conclusion in addressing charges of aiding and abetting under 18 U.S.C. § 2 (West 1969). *E.g. United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir.), *cert. denied*, 454 U.S. 1126 (1981) ("Even if a jury acquits on a conspiracy charge, it may convict on aiding and abetting."); *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978). It is obviously possible for a jury to convict a defendant as an accessory, while failing to convict him of conspiracy. That is what may have happened in this case, and such a possibility renders the RICO verdicts null and void.

Indeed, in light of the trial judge's answer to the jury's question posed during its deliberations, it is possible that the jury did not even consider both predicate acts related to the Patrizzi murder. If, for example, the jury unanimously found Granito guilty as an accessory to murder (the invalid predicate act), it may never have

addressed the conspiracy to murder predicate act charged. This, of course, is speculation, but no more so than that indulged in by the court of appeals in reaching an opposite conclusion.

In the instant case, the court of appeals erred in seeking to insinuate itself into the minds of the jurors and speculate as to what they must have been thinking when they returned a general verdict convicting Granito for violating the RICO statute. The court's theory of the jury's mental process, 65a, is certainly plausible. It may well be that some or all of the jurors accepted the government's interpretation of the pertinent tape-recorded conversations. Yet, the court overstepped its proper bounds in ruling, as a matter of law, that the jury "necessarily" so found. However logical such an interpretation may seem to the court, there is simply no way at this juncture to determine how the jury collectively reached its general verdict.[6/] The speculation inherent in the court's

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[6/] It is noteworthy that the petitioner did everything he could to ensure that the basis of the jury's verdict would be intelligible. First he moved that the predicate act charging accessory to murder be withdrawn from the jury's consideration because it was supported by insufficient evidence. Unfortunately, the government opposed striking that predicate act, and the district court rejected Granito's motion. Ultimately, the court of appeals agreed with the substance of Granito's position -- there was insufficient evidence to sustain the charge.

Second, Granito proposed that the district court submit a special verdict to the jury which would require the jury to indicate which predicate acts it relied upon if it were to find a pattern of racketeering activity. In *United States v. Ruggiero*, 726 F.2d at 922-23, the court of appeals proposed the use of such a procedure to avoid

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opinion invades and supplants the exclusive province of the jury. Accordingly, the court's conclusion that the jury did not, in fact, rely upon the impermissible accessory to murder predicate act in convicting Granito cannot stand.

This Court should grant the writ of certiorari to resolve the recurring problem confronting the courts of appeals in deciding what to do with RICO convictions that may have been based in part upon one or more legally insufficient predicate acts.

2. The due process clause of the Fifth Amendment to the United States Constitution prohibits the prosecution of a person pursuant to a statute whose terms are so vague that he must guess at their meaning. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). RICO, of course, does not contain a definition of the term "pattern of racketeering activity." All that is said in the statute is that a pattern "requires" at least two acts. This Court and the courts of appeals have struggled to fill in the interstices left by

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6/(...Footnote continued from prior page)
precisely the problem which arose in this case. *See also United States v. Riccobene*, 709 F.2d 214, 228 n.19 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983). In this case, the government opposed Granito's call for a special verdict form, and the district court rejected Granito's proposal.

Congress. *E.g. H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 109 S.Ct. 2893 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

In *Northwestern Bell*, the Court noted "the plethora of different views expressed by the courts of appeals since *Sedima*" and observed that "... developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task." ___ U.S. at ___, 109 S.Ct. at 2899. The Court resorted to lexicography, analogy to other provisions of the Organized Crime Control Act of 1970, and canvassing the legislative history to complete its analysis. It concluded that the concept of pattern embodies two distinct requirements -- (1) the predicate acts must be related to one another, and (2) there must be continuity among the predicate acts, or at least the threat of continuity. Recognizing that the phrase "continuity plus relationship" does not fully explicate the meaning of the term "pattern of racketeering activity," the Court conceded that the "limits of the relationship and continuity concepts ... cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." ___ U.S. at ___, 109 S.Ct at 2902.[7/]

[7/] In rejecting an earlier challenge to the RICO statute, the Ninth Circuit observed that if the statute failed to provide a satisfactory definition of the term "pattern of racketeering activity," the statute would not survive a vagueness challenge. *United States v. Campanale*, 518 F.2d 352, 364, *cert. denied*, 423 U.S. 1050 (1975). After *Sedima* and *Northwestern Bell*, it is clear that the statute does not fulfill this consti-

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Justice Scalia, joined by three other Justices, concurred, but argued that the majority's opinion does little more than substitute one slogan -- continuity plus relationship -- for another -- pattern of racketeering activity. Justice Scalia found the majority opinion interpreting the "enigmatic term" to be inadequate. ___ U.S. at ___, 109 S.Ct. at 2906. However, Justice Scalia conceded that he was unable to offer any interpretation of "pattern" that gives more guidance concerning its meaning and application. He also speculated that RICO might not survive a constitutional challenge on vagueness grounds because of this serious ambiguity. ___ U.S. at ___, 109 S.Ct. at 2908.

Even this Court's recent efforts to inform the ambiguous, undefined phrase "pattern" may not be enough to give ordinary people fair notice that their conduct might be deemed to be a pattern. It is not enough for the congressional intent to be apparent elsewhere if it is not apparent by examining the language of the statute. "It would be hard to hold that, in advance of any judicial utterance upon the subject, [the defendants] were bound to understand the challenged provision according to the language later used by the court." *Lanzetta v. New Jersey*, 306 U.S. 451, 456 (1939).

The indictment in the instant case did not allege that Granite committed numerous acts of closely-related

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[7/](...Footnote continued from prior page)
tutional requirement.

racketeering acts. He was charged with a total of three predicate acts. The gambling predicate act bore no relationship to the two acts pertaining to the Patrizzi murder. Under the circumstances, Granito would have had to speculate about whether his conduct fell within the parameters of the RICO statute.[8/] Because the statute furnishes no guide by which one can reasonably determine whether conduct may be penalized as a pattern by the RICO statute, the trial court erred in denying Granito's motion to dismiss the RICO counts of the indictment on constitutional grounds. Accordingly, this Court should grant the petition to decide whether RICO may be applied to predicate acts which are not related to each other, but only to the alleged enterprise.

[8/] Other factors also contributed to the ambiguity of RICO, as applied to Granito in this case. At the time of his alleged misconduct, the court had held in *United States v. Turkette*, 632 F.2d 896 (1980), that RICO does not apply to wholly unlawful enterprises. It was not until this Court reversed *Turkette*, 452 U.S. 576 (1981), that the statute clearly applied to an enterprise such as that described in the indictment. Moreover, the enterprise itself, as described in the indictment, was defined in amorphous and sundry terms. The parties and the court engaged in considerable discussion about the appropriate description which should be submitted to the jury -- whether the enterprise was La Cosa Nostra, the Patriarca Family, a subsidiary of the Patriarca Family, or something else. Finally, it was not clear at the time of the return of the indictment that the statute encompassed conspiracy to murder as a predicate act. It was only in *United States v. Angiulo*, 847 F.2d 956, 963 n.8, *cert. denied*, __ U.S. ___, 109 S. Ct. 314 (1988), that the First Circuit decided that conspiracy to murder may constitute a predicate offense under RICO.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
SAMUEL S. GRANITO
By his attorneys,

CHARLES W. RANKIN
COUNSEL OF RECORD
JAMES L. SULTAN
RANKIN & SULTAN
ONE COMMERCIAL WHARF NORTH
SECOND FLOOR
BOSTON, MA 02110
(617) 720-0011

June 1990